

IN THE DEPARTMENT OF HEALTH  
STATE OF HAWAI'I

In the Matter of Petitioner Sierra Club's	)	DOCKET NO. 17-UST-EA-02
Petition to Amend Hawaii	)	
Administrative Rules Chapter	)	Department of Health's Response to
11-281, the Underground Storage	)	Petition – Declaration that
Tank Rules, to Protect the Southern	)	rulemaking procedures to amend
O'ahu Basal Aquifer	)	Hawaii Administrative Rules chapter
	)	281 have been initiated in
	)	accordance with Hawaii Revised
	)	Statutes chapter 91 and the rules of
	)	the Department; Certificate of
	)	Service

**DEPARTMENT OF HEALTH'S RESPONSE TO PETITION - DECLARATION  
THAT RULEMAKING PROCEDURES TO AMEND HAWAII  
ADMINISTRATIVE RULES CHAPTER 281 HAVE BEEN INITIATED IN  
ACCORDANCE WITH HAWAII REVISED STATUTES CHAPTER 91 AND THE  
RULES OF THE DEPARTMENT**

**1. Introduction.**

The DEPARTMENT OF HEALTH (Department) received Petitioner SIERRA CLUB'S (Petitioner's) request for rulemaking, dated May 24, 2017, on that same day (the "Petition"). The Petition was made pursuant to, and the Department's response shall be governed by, Hawaii Administrative Rules (HAR) §11-1-51. As Petitioner is already aware, the Department is currently engaged in the fact-finding, industry outreach, drafting, and administrative planning necessary to support revisions to chapter 11-281, HAR. The public participation envisioned by Hawaii Revised Statutes (HRS) chapter 91 is a critical component of the rulemaking process and the Department intends, as it did when this chapter was recently revised in 2013, to obtain meaningful input from all affected parties and other interested persons at every stage of the process. The Department's Underground Storage Tank (UST) Program is also federally-funded and authorized by the Environmental Protection Agency (EPA). Thus, any amendments to chapter 281 must be made carefully and in accordance with EPA's procedures and requirements for program authorization outlined in 40 Code of Federal Regulations (CFR) part 281. Pursuant to these procedures and requirements, amendments to chapter 281, HAR, necessarily incorporate updates to the federal regulations in 40 CFR part 280.

**2. The Department's existing rules are consistent with their authorizing statute.**

While the Department greatly appreciates Petitioner's interest in the reworking of chapter 281, HAR, and welcomes Petitioner's involvement in the process, the Petition itself contains several incorrect observations about the nature of the Department's existing rules. The Petition claims that the Department's current rules in chapter 11-281 violate the Department's statutory authority in two specific ways: First, the Petition claims that the Department created an exemption for field constructed tanks for which there is no authorization in chapter 342L, HRS. Second, the Petition argues that the Department has failed to promulgate rules that require tanks to be upgraded, also in contravention of chapter 342L.

Petitioner's first claim, that the Department "create[d] an exemption where none is authorized by statute" [Petition at bottom page 3 and top of 4], is incorrect. The Department's rules in chapter 281, HAR, appropriately recognize that not all USTs are designed and constructed in the same manner. Despite being regulated differently, field constructed and airport hydrant fuel systems are all nevertheless regulated by the Department as "USTs" consistently with their statutory inclusion in the broader definition of USTs. Section 342L-1, which defines an "underground storage tank" or "tank" as consisting of "any one or more combination of tanks (including pipes connected thereto) used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is ten percent or more beneath the surface of the ground," excludes from this description several different kinds of tanks. For example, a "septic tank", a "surface impoundment, pit, pond or lagoon", and "a storm water or wastewater collection system" are all explicitly excluded from the definition of a UST. But while field constructed tanks and airport hydrant fuel distribution systems are currently regulated differently than "regular" 10,000-15,000 gallon USTs, this is not the case because the Department improperly excluded them from the definition of a UST. Rather, they are regulated differently because they are variable in design and construction and the standards the tank industry developed for "regular" tanks have not been applicable.

Owners and operators of field constructed tanks are currently required to comply with, for example, subchapters 6 (release reporting/investigation), 7 (release response), 8

(closure/change in service), to the exclusion of other subchapters, but certainly not to the exclusion of the entire chapter. Furthermore, the Department's rules for field constructed tanks have been, and with the revisions currently underway, will continue to be, consistent with their analogues in the federal regulations. Chapter 342L, HRS, and the revisions that have been made to it, provide the Department with the regulatory discretion necessary to make reasonable distinctions with respect to the standards and technology applicable to different types of tanks exactly because, as the federal law recognizes, not all tanks are the same.

Petitioner's second claim, that "more than two decades after being commanded to act, [the Department] has failed to enact [sic] rules requiring the upgrading of existing tanks" [Petition at top of page 4], is a mischaracterization of the regulatory framework of chapter 281 and a misinterpretation of "tank upgrades," terminology well-understood at the time chapter 342L was amended and the state program was authorized by EPA. The Department's development of chapter 281, contrary to what the Petition would suggest, is entirely consistent with the legislative history of the 1992 amendments to chapter 342L, HRS. From the Senate Committees on Energy, Environmental Protection and the Judiciary regarding H.B. 3084, which became Act 259, we are told: "The purpose of this bill is to make statutory revisions to chapter 342L, Hawaii Revised Statutes, regarding Underground Storage Tank (UST) Management, for the purposes of clarity, consistency, and *equivalency with the federal UST law.*" [Sen. Conf. Rep. 377-92 (emphasis added)]. This same language is echoed later in the Conference Committee Report on the same measure [Conf. Com. Rep. 115].

Pursuant to its effort to obtain state authorization from the EPA to administer a state UST program, and with the support of the Legislature, the Department promulgated rules in 2000 consistent with the federal guidelines for state program authorization. With the adoption of chapter 281, HAR, the state UST program incorporated federal tank installation and design standards into state law and became an authorized program effective as of September 30, 2002 [See 67 FR 60161]. While it is true the current rules, as explained above, continue to recognize the unique variability of field constructed tanks, this is entirely consistent with the federal regulations and the concept of what "upgrade" meant at the time chapter 342L was amended. The Petition's argument that

this means the Department has failed in its statutory obligation to replace or upgrade all tanks or tank systems [Petition at middle page 3] ignores the fact that the “upgrading” of tanks, in view of the regulatory context within which the UST Rules were promulgated, refers to the requirements for spill and overfill protection, corrosion protection (including, specifically, cathodic protection), and release detection. These “upgrade” requirements, taken directly from the original 1988 federal regulations, were to be installed within 10 years – thus the 1998 deadline referred to in the Petition [Petition at middle of page 3]. Notably, however, these requirements were not applied to field constructed tanks. In the case of a concrete field constructed tank with a steel liner, for example, requiring cathodic protection (one of the upgrades required of “regular” tanks) would not have made sense because the steel is not in direct contact with the soil and, thus, the risk of corrosion that system is designed to protect against is simply not present. The definition of the term “upgrade” from the 1988 federal regulations, again, the same regulations that served as the basis for state program authorization and which provided the justification for the 1992 amendments to chapter 342L, read as follows: “the addition or retrofit of some systems such as cathodic protection, lining, or spill and overfill controls to improve the ability of an underground storage tank system to prevent the release of product.” In other words, the upgrading to USTs that the Legislature had in mind in 1992 were those which were consistent with the federal rules in effect at that time.

In keeping with its directive to maintain equivalency with the federal law, the Department, in its 2013 amendments to chapter 281, introduced the concepts of operator training and delivery prohibition pursuant to the Energy Policy Act of 2005 [Pub. L. 109-58]. Secondary containment, which both the current federal and state rules require for newly installed tanks, has always been treated separately from the other standards for construction [*See* section 11-281-17, HAR]. The Department will continue to examine ways, in keeping with its statutory mandate to protect human health and the environment, to improve the regulation of USTs and UST systems. The Department will not, however, and chapter 342L does not suggest that it should, promulgate rules that obligate UST owners and operators to either install equipment or technology incompatible with a

particular UST system or invest in a particular tank design that, as designed and installed, has not been demonstrated to be protective of human health and the environment.

**3. Summary of the Department's rulemaking process.**

As a federally authorized program, the UST Program is obligated to incorporate changes to the federal regulations and otherwise comply with 40 CFR part 281. This effort requires a careful comparison of the existing UST rules with the new federal regulations (promulgated in 2015). After DOH completes its internal regulatory development processes (evaluating options, drafting and planning), careful review by the Legislative Reference Bureau (LRB), Department of the Attorney General, and EPA must follow. The LRB drafting requirements are designed to encourage consistency in rule formatting across different administrative programs and transparency with respect to the substantive changes. Specifically, rules must be drafted in Ramseyer format, showing all proposed changes from existing regulatory language. The purpose of this requirement is to “[m]ake available to the public current and historical information concerning administrative rules” and [e]stablish a system of capable of being maintained and expanded in an organized manner over a period of years, or codified should the need arise” [Sections 00-1-1(2) and (3), HAR]. Ensuring compliance with these procedural and formatting requirements entails considerable program time, effort and coordination with EPA. Consultation with EPA during the rulemaking process and prior to the introduction of a working draft is highly valued by the Department because of the technical complexity of the work and the benefits derived from working cooperatively with our federal partners. EPA review, however, necessarily contributes to the time required for the development and drafting of the UST Rules.

Any proposed changes to the rules are subject to public participation, a process which includes requesting approval from the Governor to hold a public hearing, publishing public notice in newspapers statewide, holding an official hearing, and responding to public comments. None of this can happen, of course, until after the Department has had time to develop and prepare draft rules. The Department, seeking to make the UST Rules reasonable, effective, and enforceable, typically involves the public as much as possible even in the drafting process so that the provisions can be tailored to their application in the real world as closely as possible.

Obtaining the Governor's preliminary approval to hold a public hearing requires drafting a memorandum in compliance with Administrative Directive No. 09-01. This memo explains the reasons for proposed regulatory changes, the possible impacts on the executive agency's responsibilities, programs, functions, and relationships, and possible impacts to the public, the economy, small businesses, and the state budget. A full analysis of these factors is necessary to ensure that sound decisions are made with respect to proposed regulatory changes.

Chapter 201M, HRS, requires the preparation of a small business impact statement for review by the Small Business Regulatory Review Board. The departments of the Attorney General, Budget and Finance, and Business, Economic Development and Tourism are asked to provide comments and recommendations to the Governor's office. Once the Governor approves the request to hold a public hearing, the Department will schedule a public hearing and publish an official public notice in compliance with HRS §91-3 at least 30 days prior to the hearing date. The proposed rules in final draft form are then made available for official public review and comment.

Following the official public hearing, during which all interested parties are urged to present relevant information and informed opinion for the Department's consideration, the Department must then prepare a hearings report that addresses public comments, a post-hearing small business impact statement, and an additional required rule format for filing. If no changes are made to the rules, or changes are made because of comments received and the basis for those changes is clearly reflected in the public record, the UST Rules can be finalized and submitted to the Governor for final approval.

**4. Schedule for rulemaking – amendment of chapter 281.**

\*\*\*see next page\*\*\*

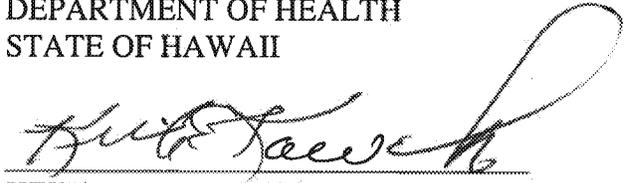


Task	Estimated Completion Date
<b>Step #1: Deciding on Rulemaking</b>	<b>9/15/2017</b>
Preliminary draft in Ramseyer format	9/15/2017
<b>Step #2: Prepare package to Governor, including rules in Ramseyer format</b>	<b>12/15/2017</b>
Deputy AG reviews draft rules	
LRB reviews draft rules	10/15/2017
EPA R9 reviews draft rules	11/1/2017
Draft pre-hearing memo to Governor	12/15/2017
Draft Small Business Impact Statement	12/15/2017
DOH HAR Review Team reviews draft rules package	
<b>Informational meetings on neighbor islands &amp; Oahu</b>	<b>2/1/2018</b>
<b>Step #3: Obtain Governor Approval for Public Hearing</b>	<b>5/1/2018</b>
Finalize package to Governor	2/15/2018
Attorney General reviews & signs memo	
Make (5) copies for Gov, AG, B&F, DBEDT/SBRRB, OPPPD	
OPPPD routes to Director's office for signature	
OPPPD hand delivers package to Gov	
Distribute copies to AG, B&F, DBEDT/SBRRB, OPPPD	
SBRRB Hearing	3/1/2018
B&F reviews and makes recommendations to Gov	3/1/2018
SBRRB/DBEDT reviews, makes recommendations to Gov	3/15/2018
<b>Step #4: Publish Public Hearing Notice (30 days before hearing)</b>	<b>5/15/2018</b>
<b>Step #5: Hold Public Hearing</b>	<b>6/15/2018</b>
<b>Step #6: Response documents subsequent to Hearing; rules in Standard format</b>	<b>8/1/2018</b>
Prepare Public Hearing Report-address comments	
Write post hearing Small Business Impact Statement	
Send response to each Commenter	
Notify AG of any changes in the rules/AG reviews & approves changes in rules	
Type rules in Standard Format	
Prepare Administrative Rules Package for OPPPD, Gov, AG, B&F, DBEDT/SBRRB	
SBRRB reviews	
<b>Step #7: Governor Approves Rules</b>	<b>9/15/2018</b>
<b>Step #8: Rules Effective 10 Days After Filing</b>	<b>10/1/2018</b>

5. **Conclusion.**

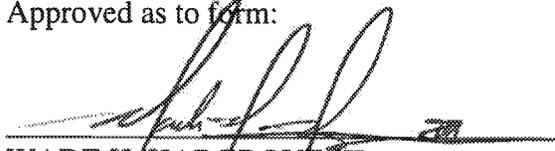
For the foregoing reasons, in accordance with law, and pursuant to the schedule for rulemaking contained herein (which shall be accelerated, if not inconsistent with the UST Program's administrative goals and the best interest of public health and the environment), the Department declares that rulemaking to amend chapter 281, HAR, has been initiated.

DEPARTMENT OF HEALTH  
STATE OF HAWAII



KEITH E. KAWAOKA, D. Env.,  
Deputy Director, Environmental Health

Approved as to form:



WADE H. HARGROVE III  
Deputy Attorney General

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O'ahu Basal Aquifer )

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true copy of the documents described below by mailing, via electronic mail, on this date, to the person(s) named below at the address(es) indicated.

DOCUMENT(S):

Department of Health's Response to Petition – Declaration that rulemaking procedures to amend Hawaii Administrative Rules chapter 281 have been initiated in accordance with Hawaii Revised Statutes chapter 91 and the rules of the Department [in Docket No. 17-UST-EA-02]

PERSON(S) SERVED AND ADDRESS(ES):

Petitioner, Sierra Club  
c/o Martha Townsend, Director  
**martha.townsend@sierraclub.org**  
P.O. Box 2577  
Honolulu, HI 96803

DATED: Honolulu, Hawaii, June 23, 2017.

  
WADE H. HARGROVE III  
Deputy Attorney General